

A KRIS ANGSANA SDN BHD

v.

EU SIM CHUAN & ANOR

B COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA

ZULKEFLI MAKINUDIN JCA

SURIYADI HALIM OMAR JCA

[CIVIL APPEAL NO: W-02-48-2006]

C 12 JUNE 2007

TORT: *Negligence - Duty of care - Claim by respondents against appellant for damage to property due to appellant's piling and excavation works - Locus standi - Whether negligence proven against appellant - Foreseeability of damage to property - Natural and ordinary use of land - Whether appellant liable - Damages - Assessment of quantum*

E The 1st respondent, the wife of the 2nd respondent, was the registered owner of certain land together with a double-storey bungalow house built thereon ('property'). At the relevant time, the property was about 30 years old with the first respondent and her family residing in it. The appellant, the owner of a number of lots that were adjacent to the property, was utilising the said lots for the development of a project ('project'). The appellant
F commenced construction works at the project site after obtaining the requisite government approvals and after having carried out a soil test investigation. Upon commencement of the sheet piling works, cracks began to appear on the property. According to the appellant, it offered to repair and rectify the damage but without
G admission of liability, an offer that was refused. Furthermore, the respondents themselves refused to take any steps to repair or minimize the damage to the property. A letter from the respondents' solicitors, which recorded the appellant's unwillingness to assume liability, was asserted to be the real reason
H for the lack of cooperation on the part of the respondents, and this was despite the appellant's own consultants reporting on the status and uninhabitable condition of the property. The appellant alleged that the property still remained in a state of disrepair even though the respondents were financially endowed enough to carry
I out the necessary repair works. The respondents thereafter filed a suit founded on negligence against the appellant. The learned High

Court judge decided in favour of the respondents and awarded damages amounting to RM6,306,242.43 to them. Being dissatisfied with that decision, the appellant filed the present appeal, submitting that: (i) the second respondent had no *locus standi* as he was neither the registered owner nor did he possess the exclusive possession or possessory title to the property; (ii) the respondents had failed to prove negligence on the part of the appellant; (iii) the appellant (as the owner of the project) was under no liability to the respondents, based on the doctrine of *Rylands v. Fletcher* as it had only used the land for the natural, ordinary and normal purpose of building on it; and (iv) the position of the English common law in relation to piling and excavation works on one's own land was enunciated in *Acton v. Blundell and Another* and is part of Malaysian common law, and absolved the appellant from liability for a natural and ordinary use of its own land.

Held (dismissing the appeal)

Per Suriyadi Halim Omar JCA delivering the judgment of the court:

- (1) With regard to the issue of the 2nd respondent's *locus standi* to proceed with the suit, it was clear that he had beneficial interest over it. He had lived in that house with his wife (the 1st respondent), two daughters, his son, his daughter-in-law, a grandchild and four servants for a period of no less than 22 years until the property was damaged by the appellant. The High Court had correctly found that the 2nd respondent had financed the building of the property. In brief, the 1st and 2nd respondents not only had possession over the property but a right to it, to the exclusion of others. This portion of the appellant's submission, thus, was a non-issue. (para 10)
- (2) On the facts, the respondents had indeed established negligence on the part of the appellant, and that due to that negligence, the respondents' property had suffered irreparable damage and was thus beyond habitation. The appellant had omitted to do something which any reasonable man in that situation would have done to avoid the respondents' suffering. However, the law is such that mere negligence by itself, regardless of the losses suffered by an aggrieved party,

- A would not suffice to pin down a wrongdoer. A wrongdoer is only liable in negligence if he is under a legal duty to take care and that injury to the aggrieved party must be foreseeable and likely to happen. On the facts, the respondents were the appellant's physical neighbours and certainly would have been affected by its actions. Further, from the evidence, the damage befalling the property as a consequence of the acts, in this case, construction activities, without any preventive actions undertaken, from a reasonable man's perspective not only was foreseeable but likely to occur. As per the set of facts of this case, only an unreasonable neighbour would care to state that such serious injury to the property was unforeseeable and that it was unlikely to occur. *Donoghue v. Stevenson* (foll). (paras 24, 25, 26)
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- D (3) In the circumstances of this case, the principles enunciated in *Rylands v. Fletcher* were not relevant. Nothing was brought onto the appellant's land, which later escaped, in line with the requirements of the latter case, to warrant its advertence, let alone the defence. *Rylands v. Fletcher* (dist). (para 28)
- E
- F (4) With respect to the archaic view in *Acton v. Blundell*, the realities of modern life must not be discounted. High densities of population in popular residential areas in Malaysia is now the norm and houses may have to be built very close to each other, at times on hilltops, or even hugging those slopes. To allow the incoming new house owner or contractor to take away the ground support of adjacent buildings, justifying such acts as natural use of his land, and thereafter blaming gravity and soil subsidence (or de-watering) as an operation of the laws of nature, is not in sync with reality. We are no more a society that lives miles apart like in the old days, but one where a sneeze is never out of the neighbour's earshot, and where likewise unreasonable activities may touch the life of a neighbour. To deny the rights of neighbours and allowing a wrongdoer to wreak havoc and heartache would militate against the very fabric of modern life and the collective ideology of a multifaceted society. In a nutshell, the case of *Acton v. Blundell* would be out of keeping with the current existing law of tort. As it stands, if no reasonable steps were undertaken by
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- the wrongdoer to ensure that no damage would be suffered by the neighbours, and they did indeed suffer damage, an actionable tort of negligence may await the wrongdoer. *Acton v. Blundell* (not foll); *Singapore Finance Ltd v. Lim Kah Ngam (Singapore) (Pte) Ltd and Eugene HL Chan Assoicates (Third Party)* (not foll). (paras 36 & 37) A B
- (5) On the evidence adduced, the respondents had proven their case on a balance of probabilities. They had established that the appellant owed them a duty of care but had failed to perform it, with damage having ensued from that failure. It must be emphasized that in as much as a landowner is entitled to assert his rights over his land, that right may be interfered with if it necessitates interference. The learned judge had, therefore, not committed any error on the issue of liability. (para 39) C D
- (6) In respect of the issue of damages and quantum, the injury suffered by the respondents was certainly not remote as it was of a kind that any reasonable man could have foreseen. Guided by that principle, the learned judge had accordingly ordered damages in the sum of RM6,306,242.43 against the appellant. The claimed sum of RM43,828.85 for the total fees of the engineers, valuers and quantity surveyors was quite reasonable, and so were the legitimate rental claims of RM12,000 per month when the respondents moved to a new location. There was thus no mathematical error when the claimed rentals totalled RM1,230,246.58. Likewise, the wages of a watchman totalling RM88,000 was not an unreasonable claim. Here, as the property had become uninhabitable, and to stay in it would endanger the respondents' lives, the sum claimed for the demolition and rebuilding amounting to RM3,393,167, which had been established, was reasonable. And of course the cost of moving back into the property in the sum of RM50,000 was a fair and acceptable sum. (paras 40, 41, 42 & 43) E F G H
- (6a) There was no error in the findings of the learned judge when he had ordered RM1,000,000 also as part of the general damages. There was ample evidence to show that the health of the 2nd respondent indeed had taken a dive, due to the continuous and persistent mental distress of seeing their home slowly disintegrating, followed by further hardship I

- A when moving house. Finally, the learned judge could not be faulted for ordering RM500,000 for a claim of aggravated and/or exemplary damages. The respondents had given the appellant very early warnings as regards the extent of the damage pursuant to its activities but to no avail. No serious preventive measures were undertaken and the sufferings of the respondents merely multiplied. Not only was the property disintegrating before their very eyes, their injured feelings were heightened by the appellant's lackadaisical and obnoxious attitude. If not for this suit, the appellant would have been quite content to remain continuously nonchalant about the whole episode. When ordering any award under the heading of exemplary damages, the resources of the appellant would be a relevant consideration. For a company that was about to build a 20-storey, two-block building, the sum of RM500,000 was quite modest, and would make no impact on its means. (paras 44, 45, 46 & 47)

Bahasa Malaysia translation of headnotes

- E Responden pertama, isteri kepada responden kedua, adalah pemilik berdaftar sebidang tanah dengan sebuah rumah banglo dua tingkat di atasnya ('hartanah'). Pada waktu yang relevan, hartanah berusia lebih kurang 30 tahun dan didiami oleh responden pertama dan keluarganya. Perayu, pula adalah pemilik lot-lot tanah bersebelahan hartanah, dan menggunakan lot-lot tersebut untuk membangunkan satu projek ('projek'). Perayu memulakan kerja di tapak projek selepas mendapat kelulusan-kelulusan perlu kerajaan dan setelah menjalankan ujian-ujian tanah yang berkaitan. Bagaimanapun, sewaktu melakukan kerja-kerja sheet piling, rekahan-rekahan muncul pada hartanah. Menurut perayu, ia bersetuju untuk membaiki kerosakan tanpa mengakui apa-apa liabiliti, tetapi tawarannya itu telah ditolak. Selain itu, responden-respon-
- F den dikatakan gagal mengambil apa-apa langkah untuk membaiki atau meminimakan kerosakan kepada hartanah. Satu surat dari peguamcara responden-respon-
- G den, yang merekod keengganan perayu untuk mengakui liabiliti, dikatakan menjadi sebab sebenar ketiadaan kerjasama dari pihak responden-respon-
- H den, dan ini berlaku walaupun konsultan perayu sendiri telah membuat laporan mengenai status dan ketidakboleh-hunian hartanah. Perayu mendakwa bahawa hartanah masih dalam keadaan tak dibaiki
- I walaupun responden-respon-

kerja baikpulih yang diperlukan. Responden-responden kemudian memfailkan satu guaman berasaskan kecuaiian terhadap perayu. Yang arif hakim Mahkamah Tinggi memutuskan untuk responden-responden dan mengawardkan gantirugi berjumlah RM6,306,242.43 kepada mereka. Merasa tidak puashati, perayu memfail rayuan di sini sambil berhujah bahawa: (i) responden kedua tidak mempunyai *locus standi* oleh kerana dia bukan pemilik berdaftar hartanah dan tidak mempunyai milikan eksklusif atau possessory title kepada hartanah; (ii) responden-responden gagal membuktikan kecuaiian di pihak perayu; (iii) perayu (selaku pemilik projek) tidak bertanggung terhadap responden-responden berdasarkan doktrin *Rylands v. Fletcher* disebabkan ia hanya menggunakan tanahnya untuk tujuan biasa mendirikan bangunan; dan (iv) kedudukan undang-undang common Inggeris berhubung kerja-kerja piling dan penggalian oleh seseorang atas tanahnya sendiri adalah seperti yang diperkatakan dalam *Acton v. Blundell and Another*, yang mana ia telah menjadi sebahagian undang-undang common Malaysia sekaligus melepaskan perayu dari liabiliti atas penggunaan biasa tanahnya itu.

Diputuskan (menolak rayuan)

Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

- (1) Berhubung isu *locus standi* responden kedua untuk meneruskan guaman, adalah jelas bahawa beliau mempunyai kepentingan benefisial ke atas guaman. Beliau telah tinggal di rumah tersebut bersama-sama dengan isterinya (responden pertama), dua anak perempuan, seorang anak lelaki, seorang menantu perempuan, seorang cucu dan empat orang pembantu rumah selama tidak kurang dari 22 tahun sehinggalah hartanah dirosakkan oleh perayu. Mahkamah Tinggi betul dalam dapatannya bahawa responden kedua telah membiayai pembinaan hartanah. Pendeknya, responden pertama dan kedua bukan sahaja mempunyai milikan hartanah tetapi juga berhak kepadanya dengan secara eksklusif. Oleh itu, hujah perayu berkaitan perkara ini bukan suatu isu.
- (2) Berdasarkan fakta, kecuaiian di pihak perayu telah dibuktikan oleh responden-responden. Mereka juga membuktikan bahawa disebabkan oleh kecuaiian tersebut, hartanah mereka telah mengalami kerosakan teruk sehingga tidak lagi boleh

- A didiami. Perayu gagal melakukan sesuatu yang boleh dilakukan oleh seorang yang munasabah dalam halkeadaan yang wujud bagi mengelakkan kesengsaraan responden-responden. Apapun, kedudukan undang-undang adalah, kecuaiian semata-mata, tanpa disokong bukti kerugian yang
- B ditanggung pihak yang terjejas, tidak mencukupi untuk menundukkan seorang pelaku kesalahan. Seorang pelaku kesalahan dalam kes kecuaiian akan hanya liable jika ia menanggung kewajiban untuk berjaga-jaga di sisi undang-undang dan jika kerugian kepada pihak yang terjejas itu
- C dapat diramalkan mungkin berlaku. Berdasarkan fakta, responden-responden adalah jiran fizikal perayu yang tentunya akan terjejas oleh tindakan-tindakan perayu. Selain itu, dari sudut pandangan seorang yang munasabah, kerugian yang dialami hartanah akibat dari tindakan-tindakan tersebut, iaitu
- D aktiviti-aktiviti pembinaan oleh perayu, tanpa adanya apa-apa tindakan pencegahan, bukan sahaja boleh diramalkan tetapi besar kemungkinan akan berlaku. Berasaskan fakta kes, hanya jiran yang tidak munasabah sahaja akan berkata bahawa kerosakan-kerosakan serius kepada hartanah adalah
- E sesuatu yang tidak dapat diramalkan akan berlaku atau besar kemungkinan tidak berlaku. *Donoghue v. Stevenson* (diikuti).
- (3) Dalam halkeadaan kes, prinsip-prinsip yang diutarakan oleh *Rylands v. Fletcher* adalah tidak relevan. Tidak ada suatu
- F apapun yang ada di bawa ke tanah perayu, yang kemudiannya melimpah keluar dan, sejajar dengan syarat kes tersebut, menuntut tindakan berjaga-jaga, apa lagi menuntut langkah-langkah keselamatan. *Rylands v. Fletcher* (dibeza).
- (4) Berhubung dengan pandangan lapuk di dalam *Acton v. Blundell*, realiti kehidupan moden tidak boleh dipandang sepi. Kepadatan tinggi penduduk di penempatan-penempatan popular di Malaysia kini menjadi satu kebiasaan dan rumah-rumah perlu dibina berdekatan di antara satu sama lain,
- H kadang-kadang di atas bukit dan malah di lereng-lerengnya. Dalam keadaan sedemikian, membenarkan seorang pemilik rumah yang baru atau seorang kontraktor untuk mengalih asas tunjang bangunan-bangunan bersebelahannya, atas alasan bahawa beliau hanya menggunakan tanahnya dengan
- I secara biasa, dan kemudian menyalahi pula graviti dan keruntuhan tanah (atau pengaliran keluar air) sebagai

- kejadian-kejadian alam, adalah tidak selari dengan realiti. Kita bukan lagi masyarakat yang tinggal berjauhan antara satu sama lain seperti di zaman dahulu, tetapi satu masyarakat di mana apa sahaja tindakan tidak munasabah kita berkemungkinan akan menjejaskan kehidupan jiran kita. Hak jiran-jiran ini tidak boleh ditolak ketepi, dan begitu juga, seorang pelaku kesalahan tidak boleh dibiarkan melakukan sesuatu sesuka hatinya, kerana ia akan merobohkan asas-asas kehidupan moden kita dan akan menghancurkan ideologi bersama yang terbina dalam kepelbagaian masyarakat kita. Pendek kata, kes *Acton v. Blundell* sudah tidak sesuai lagi dengan undang-undang tort sedia ada kini. Kedudukan perkara adalah, jika seseorang pelaku kesalahan tidak membuat sesuatu bagi memastikan bahawa tiada kerosakan akan dialami oleh jirannya, dia mungkin akan berhadapan dengan tort kecuai, jika suatu kerugian benar-benar dialami oleh jirannya itu. *Acton v. Blundell* (tidak diikuti); *Singapore Finance Ltd v. Lim Kah Ngam (Singapore) (Pte) Ltd and Eugene HL Chan Assoicates (Third Party)* (tidak diikuti).
- (5) Berdasarkan keterangan, responden-responden telah membuktikan kes mereka atas imbalan kebarangkalian. Mereka telah membuktikan bahawa perayu memikul kewajipan untuk berjaga-jaga tetapi gagal memenuhinya, sekaligus menyebabkan mereka mengalami kerosakan dan kerugian. Perlu ditekankan bahawa, walaupun seorang pemilik tanah berhak untuk melaksanakan haknya terhadap tanahnya, hak itu boleh digugat jika ia menyebabkan gangguan. Yang arif hakim, dengan itu, tidak melakukan apa-apa kesilapan berkaitan isu liabiliti.
- (6) Berhubung isu gantirugi dan kuantum, kerosakan yang dialami oleh responden-responden bukanlah sesuatu yang di luar dugaan kerana ia sememangnya boleh diramal oleh seorang yang munasabah. Berpandukan prinsip ini, yang arif hakim dengan itu telah mengawardkan gantirugi berjumlah RM6,306,242.43 terhadap perayu. Jumlah sebanyak M43,828.85 yang dituntut sebagai fee jurutera, penilai dan juruukur kuantiti adalah munasabah, dan begitu juga dengan tuntutan sewa RM12,000 sebulan disebabkan responden-responden terpaksa berpindah ke tempat lain. Oleh itu, tiada kesilapan pada perkiraan jumlah keseluruhan tuntutan sewa

- A yang mencecah RM1,230,246.58. Selain itu, tuntutan gaji jaga sebanyak RM88,000 juga tidak boleh dikatakan tidak munasabah. Hartanah sudah menjadi tidak boleh didiami kerana mendudukinya akan membahayakan nyawa responden-responden, dan oleh kerana itu, tuntutan bagi
- B perobohan dan pembinaan semula berjumlah RM3,393,167, yang telah dibuktikan, adalah munasabah. Selanjutnya, kos untuk pulang semula ke rumah sebanyak RM50,000 adalah satu jumlah yang adil dan munasabah.
- C (6a) Tiada kesilapan pada dapatan yang arif hakim memerintahkan pembayaran RM1,000,000 sebagai sebahagian gantirugi am. Terdapat keterangan kukuh yang menunjukkan bahawa kesihatan responden kedua telah terjejas, akibat dari tekanan mental yang berterusan kerana melihat rumahnya musnah secara perlahan-lahan, diikuti oleh kesukaran yang dihadapi kerana terpaksa berpindah. Akhir sekali, yang arif hakim tidak boleh dipersalahkan kerana memerintahkan RM500,000 sebagai gantirugi teruk dan/atau teladan. Responden-responden telah awal-awal lagi memberi amaran kepada
- D perayu berhubung tahap kerosakan yang diakibatkan oleh aktiviti-aktiviti perayu tetapi semuanya itu dipandang sepi. Tiada langkah keselamatan serius telah diambil oleh perayu dan itu telah menambahkan lagi kesengsaraan responden-responden. Responden-responden bukan sahaja menyaksikan hartanah mereka hancur di depan mata, tetapi terpaksa pula memendam rasa disebabkan oleh sikap buruk dan tidak peduli perayu. Jika tidak disebabkan oleh guaman ini, perayu masih tetap dengan sikap tidak kisah dengan episod yang berlaku. Dalam memberi award di bawah tajuk gantirugi teladan, kemampuan perayu adalah satu faktor relevan.
- E Sebagai sebuah syarikat yang sedang hendak membina dua blok bangunan 20 tingkat, jumlah RM500,000 adalah agak ringan, dan tidak akan menjejaskan kemampuannya.
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- H **Case(s) referred to:**
Acton v. Blundell and Another [1843] 152 ER 1223 (**not foll**)
Dodd Properties (Kent) Ltd & Anor v. Canterbury City Council & Ors [1980] 1 All ER 928 (**refd**)
Donoghue v. Stevenson [1932] AC 562 (**refd**)
Liew Choy Hung v. Shah Alam Properties Sdn Bhd [1997] 2 CLJ 601 SC
- I (**refd**)
Loh Siew Keng v. Seng Huat Construction Pte Ltd [1998] SGHC 197 (**refd**)

Pugliese v. National Capital Commission [1977] 79 DLR (3d) 592 (**refd**) A
Rylands v. Fletcher [1868] 19 LT 220 (**dist**)
Singapore Finance Ltd v. Lim Kah Ngam (Singapore) (Pte) Ltd and Eugene HL Chan Associates (Third Party) [1084] 2 MLJ 202 (**not foll**)
The Mayor, Councillors and Citizens of Perth v. Halle [1911] 13 CLR 393 (**refd**) B

Other source(s) referred to:

McGregor on Damages, 16th edn, 1997, p 287

For the appellant - BS Sidhu (Sharon Sidhu with him); M/s BS Sidhu & Co
For the respondent - David Lingam (HW Yip with him); M/s David Lingam & Co C

[Appeal from High Court, Kuala Lumpur; Suit No: S5-22-432-1997]

Reported by Suresh Nathan

D

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The 13 pages Statement of Claim, reduced to the following, had stated *inter alia*, that in or around early March 1997 the defendant (hereinafter referred to as the appellant), its staff and or agent had commenced construction works extensively on a project site. Amongst the construction works carried out on the said site were piling works. Next door was the plaintiffs' (hereinafter referred to as the respondents) house. Due to that negligent construction work, the respondents' house suffered structural damage, resulting in cracks appearing on the floor, walls, columns and beams of the property. All these damages had threatened the respondents' safety and the occupants of the said house (hereinafter referred to as the property). E
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[2] The particulars of negligence were, amongst others, failure to make any or any sufficient inspection of the land before commencing the construction work including the piling works, failure to take any sufficient steps to ensure the safety of the occupants or property bordering the construction area, failure to stop and or postpone the piling works or construction even though they had knowledge regarding the damage inflicted upon the said property, and the danger to life and safety of the respondents and occupants of the said property, failure to apply H
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- A good engineering standards properly in the said construction project, failure to give any attention or sufficient attention to the warnings given by the respondents, failure to give importance to the condition of the said property and occupants residing in houses bordering the said project site, carrying out the piling
- B works or construction works in an unprofessional manner, unreasonably without care, attention and skill and without considering at all the interest of other people, especially the respondents.
- C [3] The respondents alleged that the cracks had widened in the course of time due to the continuous piling works carried out by the appellant and or its agent on the said property. This had also caused the property to subside, sink or move.
- D [4] The agreed facts are as follows: The first respondent is the registered owner of the property which is a piece of land held under H.S. (M) 03600, H.S. (M) 03602, Geran Mukim, Lot No. 54, Seksyen 88, Geran Mukim Lot No. 47, Seksyen 88 together with a double-storey bungalow house built thereon known as No. 290A Lorong Palas, Off Jalan Ampang, Kuala Lumpur. At the
- E relevant time the property was about 30 years old, with the first respondent and her family residing in it. She is the wife of the second respondent.
- F [5] The appellant is the owner of Lots 45, 46, 50, 51, 52, 53, 57 and 58 seksyen 88, Lorong Palas, off Jalan Ampang, Kuala Lumpur. These Lots are adjacent to the property belonging to the respondent. The appellant is developing the said Lots into a project known as “Cadangan Membina 2 Blok 20 Tingkat Bangunan dengan Tingkat Basement Untuk Tempat Letak Kereta”
- G (the project). After obtaining on or about March 1997 the requisite government approvals, and after having carried out a soil test investigation, the appellant commenced construction works at the project site. After the appellant had commenced sheet piling works cracks began to appear on the property. The respondents
- H thereafter informed the appellant of the cracks and they thereafter carried out a joint inspection of the property. Pursuant to the inspection, the appellant vide letter dated 24 June 1997, had agreed to affix glass plates on the cracked areas and to monitor the movements of the glass-plates. The appellant also agreed to
- I provide props for the beam at the front portion of the main

garage. By a letter dated 10 September 1997, the appellant's former solicitors had informed the respondents' solicitors that it had referred the matter to its insurers and would revert to the respondents' solicitors accordingly.

[6] The following facts have not been agreed upon by the contending parties. According to the appellant it had offered to repair and rectify the damages but without admission of liability. This offer however was refused. Further to that, the respondents themselves had refused to take any steps to repair or minimize the damages to the property. A letter dated 21 September 1998 from the respondents' solicitors, which recorded the unwillingness of the appellant to assume liability, was asserted to be the real reason for the lack of co-operation on the part of the respondents. And this was despite the appellant's own consultants reporting on the status and uninhabitable condition of the property. The appellant had alleged that the property still remained in a state of disrepair even though the respondents were financially well endowed to carry out the necessary repair works.

[7] The respondents had thereafter filed a negligence suit against the appellant. The learned High Court Judge who decided in favour of the respondent had also ordered that damages be assessed by the senior assistant registrar. Despite that specific assessment order, the learned judge had eventually assessed the damages himself and had awarded damages to the tune of RM6,306,242.43. He had awarded interest at the rate of 8% per annum on the amount awarded, from the date of filing of the suit, to the date of realization. Costs were also ordered against the appellant.

[8] Being dissatisfied with that decision the appellant filed the present appeal and this panel heard the appeal. We had unanimously dismissed the appeal with costs.

[9] The appellant's submission before us had rested on the premise that:

- a) the second respondent had no locus standi as he was not the registered owner nor did he possess the exclusive possession or possessory title to the property;

- A b) the respondents had failed to prove negligence on the part of the appellant;
- B c) the appellant (as the owner of the project) was under no liability to the respondents, based on the doctrine of *Rylands v. Fletcher* [1868] 19 LT 220; LR 3 HL 330 as it had only used the land for the natural, ordinary and normal purpose of building on it; and
- C d) the position of the English common law in relation to piling and excavation works on one's own land was enunciated in *Acton v. Blundell and Another* [1843] 152 ER 1223 and is part of Malaysian common law, and absolves the appellants from liability for a natural and ordinary use of its own land.
- D [10] As regards the first premise ie, the issue of *locus standi* of the 2nd respondent to proceed with the suit, we were satisfied that he had beneficial interest over it. He had lived in that house with his wife (the first respondent), two daughters, his son, his daughter-in-law, a grandchild and 4 servants until the property was damaged by the appellant for a period of no less than 22
- E years. The High Court had correctly found that the 2nd respondent had financed the building of the property. In brief, the 1st respondent and the 2nd respondent not only had possession over the property but had a right to it, to the exclusion of others. This portion of the appellant's submission thus was a non-issue
- F before us.
- G [11] Having scrutinized the evidence, we found the letter of 14 April 1997 from the appellant very revealing, as it not only recognized the 2nd respondent's beneficial rights, it being addressed to him, but a willingness by the appellant to undertake certain remedial measures. In it the appellant had agreed to replace the entire floor and wall tiles on the ground floor of the property apart from other works to the entire satisfaction of the respondents. Later, a letter dated 24 June 1997, was also sent by
- H the appellant to the 2nd respondent, agreeing to place glass plates on cracks immediately. It also agreed to jointly monitor the crack situation. The appellant also had agreed to provide props for the beam at the front portion of the main garage immediately. To assist it in the performance of those remedial acts the appellant had
- I requested structural and architectural drawings to be studied by

its consultants. This was the degree of its sense of responsibility despite the refusal to admit liability openly. A

[12] Exchanges of letters had ensued thereafter between the parties, whereupon the appellant was allowed access to the property, primarily to assess the loss and damages sustained to it. On 10 April 1998, through a letter from Angkasa Reka Sdn Bhd (a company comprising civil and structural engineering experts), the appellant had admitted finding the following: B

1. Defects located at the external area of the premises have deteriorated further, visible through the widening of cracks and settlement of ground slab sections. C
2. The settlement of the ground slab has affected the delamination of external brick columns and architectural elements at the front perimeter of the building. D
3. A majority of the defects internally, mainly brickwalls and brick columns, have not shown significant signs of further deterioration.
4. E

[13] I now touch on the evidence as described by the 2nd respondent as regards the damages. It reads, *inter alia*:

Q 11: What happened when the defendant commenced work on the site? Please elaborate in detail. F

A 11.1.1 When the defendant and/or their agents, employees and/or representatives commenced construction works on the site, cracks started to appear at various places of the property. In particular, on the driveway of the property, the garden floors as well as the floors, ceilings and walls of our house. G

A 11.1.2 The ground in the garden area was substantially damaged and there was a gap left on different levels as the ground had subsided. It looked like the kind of damage an earthquake would cause. H

A 11.1.3 The concrete wall surrounding and fencing the house on the property was cracked in numerous places and was also tilting leaving many openings in the same.

A 11.1.4 There were also shifts, sinking and subsiding in various areas of the property leaving large cracks and gaps in and around the property and the house on the property. I

A A 11.1.5 The columns supporting the house also started to crack and tilt.

A 11.1.6 The alignment of the doors and windows of the house became warped and could not be properly shut and opened.

B A 11.1.7 The sewerage system in the house also started to give problems. The sewerage system was not effective and we could not utilize the flush of the wash closet properly.

A 11.1.8 Moreover, there were pipes leaking on the property.

C A 11.1.9 ...

A 11.1.10 I am not confident that the damage to the house has stopped just because the construction have halted. I believe that the construction works of the defendant and/or their agents, employees and/or representatives on the site would most likely have cause latent damage to the property which will eventually cause the property to deteriorate at a greater rate.

D

E A. 11.2.1 My family and I were extremely worried and concerned of our safety as the cracks in the walls, columns, floors and ceilings were getting larger from day to day. We were always afraid of the house collapsing due to the damage to the house.

...

Q 21 Was the property fit to be resided in?

F A21.1 Initially, when the defendant commenced their construction, there was only minor damage caused to the house by the construction works of the defendant on the site. However, in a matter of months, our house became totally uninhabitable due to the widening of the wall and floor cracks, the cracking and damage to the columns supporting the house, the non-functioning sewerage system, the fear of the electrical system short circuiting, the problems of opening and closing doors and windows in the house and above all other factors, the fear for our safety due to the threat of the house collapsing.

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H **Q22) Did you vacate the property? If yes, when?**

A22.1 Despite the house and the property holding great sentimental value as well as a good location, we had no choice but to move out of the house for fear of our safety.

I A22.2 We shifted out sometime in September 1997.

[14] Taking a sample of the 2nd respondent testimony, he had testified that the property was uninhabitable due to the acts of the appellant, and was in a state that would endanger his life, the 1st respondent and the other occupants. It was thus necessary to move out of that home.

A

[15] From documentary evidence, these damages were also confirmed by the Dewan Bandaraya Kuala Lumpur (DBKL), which had made its own investigation after having received complaints from the respondents of the repercussion of the appellant's construction activities. The appellant had replied to the DBKL reiterating that any reasonable claims would be resolved by its insurance. In a gist there was no doubt that the house had been badly damaged. This predicament was in stark contrast prior to it being damaged when it was "sturdy and safe" and reasonable for the respondents' station in life.

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[16] We were thus satisfied that the house was badly damaged making it uninhabitable and hence justifying the respondents and his family moving out of the house.

[17] There was thus absolutely no error on this finding of fact as regards the extent of the damages by the presiding learned judge.

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[18] The following questions to be answered will be what were the causes of the substantive damages and who the wrongdoer was. The appellant in its submission ventilated that the damage to the respondents property was due to the differential settlement caused by the forces of nature and had highlighted PW4's evidence which stated that 'the damage was due to ground movements caused by subsidence which resulted from movement of the water table'. Having gone through the latter's evidence, it must be emphasized that one cannot be partisan to words, which may taken out of context, whether from oral testimonies or reports, merely to suit the purpose of a particular submission. PW4 did admit that the cracks were due to settlement and drawdown of the water table and had observed that the building was not fit for habitation and was beyond repair. He did admit that the damage was caused by ground movement subsidence, but what counsel for the appellant failed to supply were the words, "subsidence which was caused by the movement of water table due to the construction activities nearby."

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A [19] PW5, an experienced engineer by profession who had carried out a visual survey of the damages had also concluded that “the damage to the property in question (‘the property’) was related to the on-going construction in the adjacent property”, activities carried out by the appellant.

B [20] Credit however must be given to counsel for the appellant as regards the evidence of DW1, which was not censored unnecessarily. The admission of DW1 that the damages were due to ‘the settlement of sub-soil strata due to lateral movements of earth during the construction of the deep basement adjacent to the building and settlement due to lowering of the ground water table during the construction of the deep basement’ was divulged. C DW2, the architect of the appellant for the adjacent project had also unreservedly admitted, “I agree that the damage to the D plaintiffs’ property (respondents’) was as a result of the piling works done conducted by the defendant.” He had further testified, “... I confirm that the defects to the plaintiffs’ property had deteriorated from 1997 to 1998”. Apart from the instructive respondents’ witnesses’ testimony, what with DW1’s admission E compounded by DW2’s corroboration, the defences of the appellant were now in shambles.

[21] As observed above, the factual findings of the learned judge here, as to the cause of the damages, likewise was impeccable. F The judge had immaculately stated the following:

Such activities had caused movement and settlement of the underground soil which in turn caused damages to the plaintiffs’ bungalow house which developed cracks in various parts of the building including the compound of the said bungalow.

G [22] Despite the complaints by the respondents, and despite the obvious damages befalling the property, the appellant had continued with its activities. Even a neighbour had a taste of the appellant’s nonchalance. As early as 17 January 1997 DBKL had occasion to order the appellant to cease all construction activities H due to the damages suffered by that neighbour (a bungalow owned by the Government of Sabah). Again on 14 August 1997 the DBKL had informed the appellant of complaints having been received and had requested the appellant to co-operate by sending I to it a report of the latest development. The cavalier attitude of

the appellant again met the wrath of DBKL when in April 1998, it was ordered to stop that impugned construction activities, based on similar grounds. By then it was too late.

[23] Needless to say, we were satisfied that the construction works carried out by the appellant had been the direct cause of the damages befalling the property. It was also our finding that not only was the construction the cause of the damage to the property but that the appellant never took any form of precautionary or preventive steps before commencing the activities. The High Court judge in same vein had succinctly authored that:

Hence in the light of the clear cause of action alleged by the plaintiff against the defendant for negligent acts particulars of which had been enumerated in para 7 of the Statement of Claim *the defendant should prove to the satisfaction of the Court that it had taken all the necessary steps and measures to prevent possible damages to said bungalow adjacent to the Defendant's construction site. No such evidence had been adduced by any of the defence 4 witnesses* (emphasis added).

[24] We were satisfied that the respondents had established negligence on the part of the appellant, and due to that negligence, the respondents' property had suffered irreparable damages and hence beyond habitation. The appellant had omitted to do something which any reasonable man in that situation would have done to avoid the respondents' sufferings. But the law is such that mere negligence by itself, regardless of the losses suffered by an aggrieved party, will not suffice to pin down a wrongdoer. A wrongdoer is only liable in negligence if he is under a legal duty to take care. That injury to the aggrieved party, or time immemorial referred to as the neighbour, must be foreseeable, and likely to happen.

[25] Who then is the neighbour? Lord Atkin in *Donoghue v. Stevenson* ([1932] AC 562/580) had said the following:

The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question (emphasis added).

- A [26] Needless to say from the set of facts, the respondents were the appellant's physical neighbour, and certainly would have been affected by its actions. Further, from the evidence, the damages befalling the property as a consequence of the acts, in this case, construction activities, without any preventive actions undertaken,
- B from a reasonable man's perspective not only was foreseeable but likely to occur. As per the set of facts before us, only an unreasonable neighbour would care to state that such serious injury to the property was unforeseeable and that it was unlikely to occur.
- C [27] *Rylands v. Fletcher* [1868] 19 LT 220, for some unknown reason was submitted by counsel for the appellant, in support of its case, an approach which had baffled us. The principle in that
- D case merely states that if a person brings or accumulates on his land anything, which if it should escape may cause damage to his neighbour he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage. This cause of action therefore imposes an absolute liability on that
- E wrongdoer. To be liable, the wrongdoer must have brought something on to his land likely to cause mischief if it escapes, and which has in fact escaped, and those things happened in the course of some use of the land.
- F [28] In the circumstances of this case we were unable to agree with the submission of the appellant that the principles enunciated in *Rylands v. Fletcher* were relevant. Nothing was brought onto the appellant's land, which later escaped, in line with the requirements of the latter case, to warrant its advertence, let alone the defence.
- G [29] The last legal issue canvassed by the appellant was the position of the English common law in relation to piling and excavation works on its own land as enunciated in *Acton v. Blundell and Another* [1843] 152 ER 1223. The appellant had submitted that it was part of Malaysian common law, and that being so it
- H had absolved the appellants from liability for a natural and ordinary use of its own land. In brief the appellant had submitted that the principle that emanated from the above case was an absolute defence.
- I

[30] The facts in the above case were that the plaintiff had sunk a well in his property for raising water for the working of his mill. The defendant had later sunk two coal pits on its land adjacent to that of the plaintiff's land. Due to that two coal pits the water supply to the plaintiff's mill was affected causing losses to the latter. The plaintiff sued the defendant for interfering with his rights of enjoyment over the water flowing under his land. The court had found for the defendant. It was held that an owner of land through which water flows in a subterraneous course, has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from him.

[31] Come *Singapore Finance Ltd v. Lim Kah Ngam (Singapore) (Pte) Ltd. and Eugene HL Chan Associates (Third Party)* [1084] 2 MLJ 202 the principle of the above case of *Acton v. Blundell* was adapted. The facts are as follows:

[32] In mid-January 1974 the defendants were excavating their site enclosed with a cofferdam for 3 basement floors. They were in the course of erecting a 13-storey building. During this period, the owners of buildings in the neighbourhood complained that cracks had appeared in their buildings. The plaintiffs whose building suffered extensive cracks claimed damages for loss of support, nuisance as well as negligence against the defendants. The plaintiffs alleged that by reason of the excavations, the bottom of the hole, thereby formed, heaved upwards and the ground upon the sides of the cofferdam moved downwards and laterally towards the excavation hold, having passed underneath the sheet piles surrounding the defendants land, with the consequence that the surface ground in the immediate vicinity subsided and the buildings standing on them thereafter suffering cracks.

[33] Throughout the trial, the defendants contended and admitted that ground de-watering of the plaintiffs' soil had been caused by the excavation works. But the defendants and the third party maintained that such de-watering, that is the flow of water from the plaintiffs' soil into the excavation hole through indeterminate or undefined channels, was due to the forces of nature and the forces of gravity, and was neither avoidable, given the state of engineering at all material times, nor was it due to any positive

A acts done by the defendants, their servants or agents. The defendants contended that the damage to the plaintiffs' building was *damnum sine injuria*.

B [34] It was held on dismissing the plaintiffs' claim, that the English Common Law, which was first declared in *Acton v. Blundell*, was received into and had become part of the law of Singapore.

C [35] To summarise, in *Acton v. Blundell* it was a deliberate case of the plaintiff being cut off from water, albeit under ground, caused by the action of the defendant, whilst in *Singapore Finance Ltd v. Lim Kah Ngam (Singapore) (Pte) Ltd and Eugene HL Chan Associates (Third Party)*, the damage to the plaintiff's building was caused by differential consolidation settlement brought about by de-watering, and accentuated by other factors. Simply put, the de-watering and act of the defendant had caused the surface ground in the immediate vicinity to subside, resulting in the plaintiff's property, which stood on the subsided land, to suffer cracks.

D [36] With respect to the archaic view of *Acton v. Blundell* the realities of modern life must not be discounted. High density of population in popular residential areas in Malaysia is now the norm. Houses may have to be built very close to each other, at times on hilltops, or even hugging those slopes. To allow the incoming new house owner or contractor to take away the ground support of adjacent buildings, justifying such acts on natural user of his land, and thereafter blaming gravity and soil subsidence (or de-watering) as an operation of the laws of nature, is not in sync with reality. We are no more a society that lives miles apart like the olden days, but in one where a sneeze is never out of the neighbour's earshot; and where likewise unreasonable activities may touch the life of a neighbour. To deny the rights of neighbours, and allow a wrongdoer to wreak havoc and heartache, would militate against the very fabric of modern life and collective ideology of a multi-faceted society. In a nutshell the case of *Acton v. Blundell* would be out of keeping with the current existing law of torts. As it stands, if no reasonable steps were undertaken by the wrongdoer to ensure that no damages would befall the neighbours, and did indeed suffer them, an actionable tort of negligence may await him.

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[37] To wind up the issue of liability we therefore reject the rule propounded in *Acton v. Blundell*. On that premise, we also reject the stance of *Singapore Finance Ltd v. Lim Kah Ngam (Singapore) (Pte) Ltd and Eugene HL Chan Associates (Third Party)*, which had adapted *Acton v. Blundell*. The rejection of the latter case is not without precedent. In *Pugliese v. National Capital Commission* [1977] 79 DLR (3d) 592, it was resolved that:

The rule of English common law that ownership of land carries the absolute right to abstract or interfere with the flow of underground water, whatever the effect on the owner's neighbour, ought not to be applied without reference to the modern law of negligence and nuisance. While the plaintiffs did not have an absolute right to the support of subsurface water, they did have a right not to be subjected to interference with the support of such water where such interference amounted to negligence or nuisance.

[38] In *Loh Siew Keng v. Seng Huat Construction Pte Ltd* [1998] SGHC 197, the Singapore High Court had occasion to opine:

The result then is that I have to consider whether the Singapore Courts should adapt the rule in *Acton v. Blundell* as a matter of choice. On careful consideration, I came to the conclusion that it should not be the law of Singapore ...

I do not think that the rule in *Acton v. Blunder* can be justified today.

[39] Having perused the evidence we were satisfied that the respondents had proven their case on a balance of probability. They had established that the appellant owed them a duty of care but had failed to perform it, and damages having ensued resulting from that failure. It must be emphasized that in as much as a land owner is entitled to assert his rights over his land, that right may be interfered with if it necessitates interference (*The Mayor, Councillors and Citizens of Perth v. Halle* [1911] 13 CLR 393). We therefore had found no error having been committed by the learned judge here on the issue of liability.

[40] What was left for consideration was the issue of damages and the quantum (the issues under Rayuan Sivil No. 02-616-2006). The injury suffered by the respondents here was certainly not remote as it was of a kind any reasonable man could have foreseen. Guided by that principle the learned judge had accordingly ordered damages in the sum of RM6,306,242.43

A against the appellant, with interest at the rate of 8% p.a, on the amount awarded from the date of filing the suit to the date of realization.

B [41] Witnesses had been called by the appellant, and in the course of which, the respondents had adduced evidence pertaining to the losses and eventual quantum. The claimed sum of RM43,828.85 for the total fees of the engineers, valuers and the quantity surveyors was quite reasonable. And so were the legitimate rental claims of RM12,000 per month when the respondents moved to a new location. There was thus no mathematical error when the claimed rentals totalled RM1,230,246.58. Likewise the wages of a watchman totaling RM88,000 was not an unreasonable claim.

C [42] Before proceeding further, it is necessary to state that the underlying object for the assessment of damages is to put an aggrieved party in the same position as he had occupied, prior to the time when the wrong was done on him (*Dodd Properties (Kent) Ltd & Anor v. Canterbury City Council & Ors* [1980] 1 All ER 928; *Liew Choy Hung v. Shah Alam Properties Sdn Bhd* [1997] 2 CLJ 601). For special damages, losses which are actual, and unavoidable, invariably monetary awards too will be ordered so as to compensate him.

D [43] Here, as the property had become uninhabitable, and to stay in it would endanger the respondents' lives, let alone repairing of it would not be feasible, the sum claimed for the demolition and rebuilding amounting to RM3,393,167, which had been established, was reasonable. And of course the cost of moving back into the property in the sum of RM50,000 was a fair and acceptable sum.

E [44] We found no error in the findings of the learned judge when he had ordered RM1,000,000 also as part of the general damages. Practitioners are well aware that general damages represent losses which are not easily quantifiable, with losses in the like of mental stress, hardship etc. as suffered by the respondents, also falling under the heading. There was ample evidence to show that the health of the 2nd respondent indeed had taken a dive, due to the continuous and persistent mental distress of seeing their home slowly disintegrating, followed by further hardship when moving house.

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[45] Finally we were unable to default the learned judge for ordering RM500,000 for a claim of aggravated and/or exemplary damages which is part of general damages. The respondents had given the appellant very early warnings as regards the extent of the damages pursuant to its activities but to no avail. No serious preventive measures were undertaken and the sufferings of the respondents merely multiplied. Not only was the property disintegrating before their very eyes but their injured feelings were heightened by the lackadaisical and obnoxious attitude of the appellant. If not for this suit the appellant would have been quite content to remain continuously nonchalant about the whole episode.

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[46] The behaviour of the latter not only had affected the respondents but had also attracted the attention and wrath of the authorities (DBKL). Whether such reprehensible behaviour of the appellant, could have attracted aggravated damages, *McGregor on Damages* (16th edn 1997) p. 287 had occasion to state:

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The primary object of an award of damages is to compensate the plaintiff for the harm done to him; a possible secondary object is to punish the defendant for his conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are variously called exemplary damages, punitive damages, vindictive damages or even retributory damages, and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment as where it discloses malice, fraud, **cruelty, insolence or the like**. (emphasis added)

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[47] When ordering any award under the heading of exemplary damages the resources of the appellant would be a relevant consideration. For a company that was about to build a 20 storied 2 block-building, the above sum of RM500,000 was quite modest, and would make no impact on its means.

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[48] Founded on the above reasons this panel had dismissed the appeal with costs and had affirmed the decision of the learned High Court judge.

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[49] My learned brother Zulkefli b Ahmad Makinudin JCA has seen this judgment in draft and has expressed his agreement with it.

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A Mokhtar Sidin JCA:

[50] I have the opportunity of reading the judgment in draft of my learned brother, Suriyadi Halim Omar, JCA and agree with the reasonings and the decision therein.

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